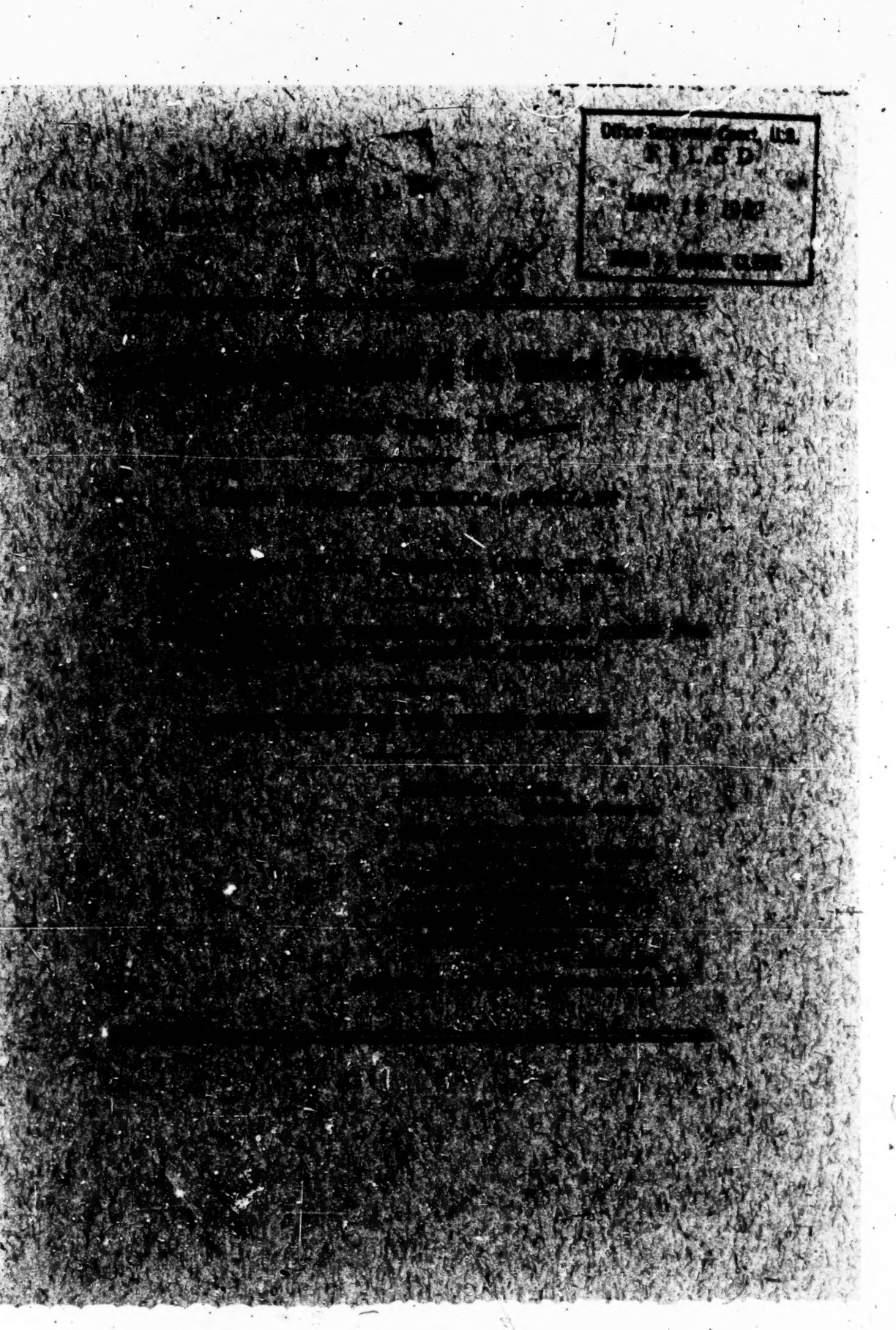

Office Supreme Court, U.S.
FILED
APR 14 1982

INDEX

CITATIONS

Cases: Page

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 7

Blackwood v. United States, 138 F. 2d 461 4

Braatelien v. United States, 147 F. 2d 888 5

Bryan v. United States, 175 F. 2d 223 5

Land v. United States, 177 F. 2d 346 5

McCoy v. United States, 169 F. 2d 776, certiorari denied, 335 U.S. 898 4

Moore v. Mead's Fine Bread, 348 U.S. 115 9

Rescue Army v. Municipal Court, 331 U.S. 549 7

Stirone v. United States, 361 U.S. 212 5

United States v. Alford, 274 U.S. 264 7

United States v. Evans, 333 U.S. 483 7

United States v. Five Gambling Devices, 346 U.S. 441 7

United States v. Glasser, 116 F. 2d 690, modified, 315 U.S. 60 5

United States v. Halseth, 342 U.S. 277 5

United States v. Harriss, 347 U.S. 612 8

United States v. Kahriger, 345 U.S. 22 7

United States v. Lem Hoy, 330 U.S. 274 5

United States v. Minneapolis Elec. Contractors' Ass'n., 99 F. Supp. 75 3

United States v. Neff, 212 F. 2d 297 5

United States v. Shindler, 173 F. Supp. 393 4

United States v. Spector, 343 U.S. 169 7

United States v. Wurzbach, 280 U.S. 396 6

Williams v. United States, 341 U.S. 97 6

Statutes and Rules:

Federal Rules of Criminal Procedure, Rule 7(c) 3

Robinson-Patman Act, Section 3, 49 Stat. 1526, 15 U.S.C. 13a 1, 5, 8, 9, 10

632801—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

REPLY BRIEF FOR THE UNITED STATES

Most of appellees' contentions have already been fully answered in our main brief. A few of their arguments, however, call for a short reply.

1. Appellees challenge our contention that the constitutionality of the prohibition in Section 3 of the Robinson-Patman Act against selling at unreasonably low prices for the purpose of destroying competition is to be determined on the basis of the predatory sales charged in this indictment, namely, sales below cost with the loss absorbed by the profits on other activities of a nationwide business. Appellees argue (Br. 5–16) that the offenses charged in the indictment are not limited to sales below cost; and that,

in any event, the issue is the constitutionality of the statute "on its face" (Br. 9). Neither contention is sound.

a. Each of the seven counts charging violation of the Robinson-Patman Act sets forth the offense in two paragraphs under the single heading: "Offense Charged—Robinson-Patman Act." Count Two (R. 8–9) is typical. Under the foregoing heading, paragraph 22 alleges that National sold milk to its distributors in the Paola-Osawatomie, Kansas, market "at unreasonably low prices for the purpose of destroying competition" in that market, "in violation of Section 3 of the Act of Congress * * * commonly known as the Robinson-Patman Act." This clause is in the language of the statute. Paragraph 23 alleges that, "[p]ursuant to and in effectuation of the offense charged in paragraph 22 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Paola-Osawatomie, Kansas market *by intentionally selling milk to its distributor Martin at prices below National's cost*" (emphasis added). Paragraph 24, under the heading "Effects," states that the "effects *of the aforesaid offense*, among others, have been to cause severe financial losses to small dairies doing business" in that market, and "to cause such dairies to suffer losses in sales volume" (emphasis added).

The particularization of the offense set forth in paragraph 23 plainly limits and qualifies the broader language of paragraph 22. Paragraph 23 makes it explicit that the sales at "unreasonably low prices" charged in this indictment are sales "at prices below National's cost." It is the two paragraphs together, the second limiting the first, that set forth the offense charged in Count Two. "[T]he indictment must be read as a whole, not by sentences." *United States* v. *Minneapolis Elec. Contractors' Ass'n*, 99 F. Supp. 75, 78 (D. Minn.). The charging portion of the count explicitly sets forth the "Offense Charged" in two paragraphs under that heading, and not just in the statutory language used in the first paragraph. The "Effects" paragraph of the count, which immediately follows the two paragraphs setting forth the "Offense Charged," plainly refers to those two preceding paragraphs when it speaks of the effects of the "aforesaid offense." The two paragraphs of the charging portion of the count thus constitute the "plain, concise and definite written statement of the essential facts constituting the offense charged," which Rule 7(c) of the Federal Rules of Criminal Procedure requires the indictment to contain.[1]

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[1] Contrary to appellees' contention (Br. 8-9), government counsel did not state to the district court that "the indictment has a broader scope than below-cost sales." The colloquy upon which appellees rely, during which government counsel stated that an unreasonably low price "does not have to be below cost" (R. 115), related to the general scope of the statute, and not to the offense charged in this particular indictment. Indeed, appellees' counsel himself previously had recognized that "one argument that the Government makes is, certainly it is an unreasonably low price where a defendant charged under Section 3 sells below cost" (R. 95).

This interpretation of the indictment is in accord with the rule that when various acts are alleged in a single count, "all of its recitations and averments must therefore be read and considered together." *Blackwood* v. *United States*, 138 F. 2d 461, 463 (C.A. 8); see, also, *McCoy* v. *United States*, 169 F. 2d 776, 780 (C.A. 9), certiorari denied, 335 U.S. 898; *United States* v. *Shindler*, 173 F. Supp. 393, 395 (S.D. N.Y.). In the *Shindler* case, Count Two of the indictment charged a violation of Section 17(a)(2) of the Securities Act of 1933, "first, in the language of the statute [the defendant 'did unlawfully * * * obtain money * * * by means of an omission to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading'], and then by particularizing the acts complained of [having called the attention of the purchasers of stock to the price at which it was selling on the American Stock Exchange, 'but having omitted to state the material fact that said price of said stock had been caused to rise and had been prevented from falling by the said defendants * * *']." In refusing to dismiss this count, the court stated (p. 395, emphasis added): "By going beyond the statutory language with greater specificity the defendants are more fully informed of the crime charged, enabling them thereby to prepare their defense to meet the prosecution's case, and at the same time protected against double jeopardy. *The parts of the count must be read together.*"

Appellees' argument implicitly assumes that the government will not be limited at trial to proof of the acts specified in the second paragraph of each of the Robinson-Patman Act counts. Yet such a limitation would clearly be imposed if the specifications had been contained in a bill of particulars. *E.g.*, *United States* v. *Neff*, 212 F. 2d 297, 309 (C.A. 3); *Land* v. *United States*, 177 F. 2d 346, 349 (C.A. 4); *Brijan* v. *United States*, 175 F. 2d 223, 224 (C.A. 5); *Braatelien* v. *United States*, 147 F. 2d 888, 892 (C.A. 8); *United States* v. *Glasser*, 116 F. 2d 690, 702 (C.A. 7), modified on other grounds, 315 U.S. 60.[a] *A fortiori*, when the indictment itself particularizes the acts alleged to violate the statute, appellees can be convicted only if the specific acts charged are proven. Cf. *Stirone* v. *United States*, 361 U.S. 212.

b. The contention that the constitutionality of Section 3 must be determined "on its face" (Br. 9–16), rather than "as applied" in this particular case, is but another way of arguing that the statute should be invalidated if hypothetical situations can be imagined to which its application may pose serious constitutional problems. The Court, of course, necessarily looks to the "face" of the statute in deciding the constitutional issue, in the sense that it must first ascertain what the statute does, to whom it applies, and what standards it provides. Thus, in the

[a] For the purposes of the Criminal Appeals Act, the particulars are to be considered as limiting the indictment, unless the district court has not so treated them. See *United States* v. *Lem Hoy*, 330 U.S. 724, 725, 730; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

present case the Court will have to determine whether the statutory language applies to the conduct charged in the indictment, *i.e.*, whether the sales below cost for the purpose of destroying competition are covered by the statutory prohibition on selling at unreasonably low prices for that purpose.

But legal issues are not decided in a vacuum. In the delicate field of constitutional adjudication, this Court consistently has refused to reach beyond the particular case before it and to strike down a federal statute on the basis of its conjectural application to other situations. See our main brief, pp. 32–35; *Williams* v. *United States*, 341 U.S. 97, 101; *United States* v. *Wurzbach*, 280 U.S. 396, 399. The principle is equally applicable whether the Court is called upon to decide the constitutional issue on direct appeal under the Criminal Appeals Act from a dismissal of an indictment, or upon review of a conviction. For the primary purpose of the rule requiring definiteness in criminal statutes is to give adequate warning of what conduct is prohibited, and this purpose is satisfied, as to a particular defendant, when he is adequately informed by the statute that his conduct is prohibited thereby.

The cases upon which appellees rely (Br. 11–14) do not require a contrary conclusion. In most of them where the Court decided the constitutional question "on the face" of the statute, the indictment itself was drawn in the statutory terms, and the con-

stitutional issue posed was thus as broad as the statute itself.[2] In other instances, the issue of vagueness would be the same no matter to what facts the statute were applied.[3] In none of them, however, did the Court reach out to strike down, on the basis of its possible applicability to other facts, a statute which, as applied to the particular offense before it, was not indefinitely vague.

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[2] *United States* v. *Kahriger*, 345 U.S. 22 (No. 167, O.T. 1952, R. 2); *United States* v. *Spector*, 343 U.S. 169 (No. 443, O.T. 1951, R. 2); *United States* v. *Alford*, 274 U.S. 264 (No. 983, O.T. 1926, R. 2, other than the ambiguous first count); *United States* v. *Evans*, 333 U.S. 483 (No. 15, O.T. 1947, R. 1).

[3] In *United States* v. *Five Gambling Devices*, 346 U.S. 441, the statute required dealers in gambling devices to register with the Attorney General the address of their principal place of business and of their place of business "in such district." The quoted words were not defined, and were apparently left in the bill through oversight. In considering whether this provision was unconstitutionally vague, the facts of the specific case were immaterial and there was no distinction between judging the statute on its face or viewing it as applied. Similarly, in *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, which sustained a petroleum conservation statute prohibiting "unreasonable waste", the statute was examined on its face because the proceeding was for a writ of prohibition against its enforcement. The issue was whether the statute conferred jurisdiction on the lower court to entertain any enforcement action whatever, without regard to whether a particular defendant had been denied his right to a fair warning. (See 284 U.S. at 15–16.) Contrary to appellees' contention (Br. 12, n. 3), the "well-settled" ruling of *Bandini* which this Court cited in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, was that a judgment denying a writ of prohibition was final for appeal purposes notwithstanding that enforcement proceedings might follow; the rule was not related to the question in the instant case.

c. In urging the Court to decide only whether Section 3 is constitutional as applied to the sales below cost charged in this indictment, we are not suggesting that, if the constitutional issue were to be decided on the broader basis of the "face" of the statute, the statute would be invalid. On the contrary, we believe that the arguments we have made in our main brief to show that the statute is constitutional as here applied are equally applicable to uphold its constitutionality on its face. See *United States* v. *Harriss*, 347 U.S. 612, 618. We press the argument, however, because we believe that sound judicial administration strongly counsels against the decision of hypothetical constitutional questions that are in fact not presented by the actual case before the Court.

2. Appellees argue (Br. 19–20, 40–42, 55–57) that in our main brief we improperly relied upon the legislative history of the geographical price discrimination clause of Section 3 to show Congressional intent to prohibit sales below cost in the unreasonably low prices clause of that section. Both clauses, however, are designed to prevent the same kind of illegal action, namely, predatory pricing practices for the purpose of destroying competition or eliminating a competitor. They differ only in that they condemn different means to achieve this illegal objective. The one prohibits sales in one part of the country "at prices lower than exacted by said persons elsewhere in the United States"; the other, which is involved in this case, prohibits sales at "unreasonably low prices." But successful selling below cost can be

accomplished over an extended period only if the seller has other profitable markets or product lines in which it can recoup its losses; in the present case, the indictment charges that National "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor" in certain local markets (R. 9, 12, 15, 19, 22, 29, 32). The use of such predatory price cutting by large firms as a means of destroying competition has long been recognized by the courts and Congress. See *Moore* v. *Mead's Fine Bread*, 348 U.S. 115, 119–120, and our main brief, pp. 12–17. Since both clauses of Section 3 are designed to achieve the same basic purpose, their legislative histories may be considered together to show Congressional concern with below-cost sales in Section 3.

3. Finally, appellees contend (Br. 58–71) that, even as applied to the sales below cost charged in this indictment, Section 3 would still be unconstitutional, since "below cost" is itself a "Vague and Indefinite Standard" (Br. 58). While there may be problems of defining cost in other contexts, the indictmen in this case charges National with "*intentionally* selling milk to its distributor * * * at prices below National's cost" (*e.g.*, R. 9, emphasis added). In other words, this indictment charges National with willfully and knowingly selling below cost. If National's own books show, under whatever cost accounting system the company follows, that it sold

below cost, or if there is evidence that National's officials admitted selling below cost, plainly appellees could not complain that they did not have adequate warning that they sold intentionally below cost within the meaning of the indictment and in violation of the statute. If appellees are uncertain as to what the indictment means in charging them with intentionally selling below cost, they can seek additional information through a bill of particulars.

4. The basic fallacy in appellees' argument is that they would have the Court decide this case as if it were a scholastic exercise in etymology and cost accounting. Section 3 must be read in the context of our historical and continuing antitrust policy—a policy of preventing the destruction of competition and the growth of monopoly. The words, especially words like "unreasonable," take meaning from the context. Beginning with the Clayton Act of 1914, later in the Robinson-Patman Act and again in the Celler-Kefauver amendment to Section 7, Congress sought to halt restraints of trade in their incipiency, especially by outlawing those specific tactics which the dominant firms in a market may use to suppress their competitors. Sales below cost (*i.e.*, at less than the seller's own cost) *for the purpose of destroying competition or eliminating a competitor* have been recognized as undesirable predatory practices since before the Sherman Act was enacted. It is entirely plain that Section 3 makes this practice unlawful *per se* without requiring the government to prove that there

has been a conspiracy in unreasonable restraint of trade or that a monopoly has developed.

CONCLUSION

For the foregoing reasons, and those set forth in our main brief, the judgment of the district court dismissing counts 2, 4, 6, 8, 10, 13, and 15 of the indictment should be reversed.

Respectfully submitted.

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